Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1975

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NO. 75-5101

****

VICENTE RAMIREZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

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78205

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner Vicente Ramirez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 28, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Western District of Texas, San Antonio Division.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 28, 1975. A timely petition for rehearing was denied on November 28, 1975, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, in a prosecution arising under 18 U.S.C.App. §1202(a)(1), the place of a firearm's receipt may be, in certain cases, not only a question of venue but also a fact necessary to constitute the offense, and thereby require a reasonable-doubt standard of proof?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Appendix

§1202.

(a) Any person who—

(1) has been convicted by a court of the United States or any political subdivision thereof of a felony, or * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act (June 19, 1968), any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

* * *

STATEMENT OF THE CASE

Petitioner was arrested on October 24, 1971, in San Antonio, Texas, in the Western District of Texas, in possession of a gun.

Petitioner, a convicted felon, was charged with having received a firearm in or affecting commerce in violation of 18 U.S.C.App. §1202(a).

Prior to trial, Petitioner stipulated, in addition to his being a convicted felon, that the gun had traveled on May 27, 1971, in commerce from New York to Texas. The stipulation was silent as to who were the sender and recipient of the gun in its interstate

travel. It was silent as to where Petitioner received the gun, or when he received it. Likewise, the stipulation provided no information as to where the gun was manufactured.

At trial, the Government showed by direct evidence that Petitioner possessed the gun in the Western District of Texas, and attempted to show by circumstantial evidence that he had received it there also.

The place of receipt of the firearm was submitted as an issue to the jury. Beforehand, the parties presented differing arguments on the necessary burden of proof associated with the issue, Petitioner urging use of a reasonable-doubt standard, the Government a preponderance standard.

Petitioner reasoned that, even though the stipulation established beyond a reasonable doubt the date of the gun's travel and the geographical reference points of its travel, such stipulation did not establish at all the necessary interstate-commerce nexus required by United States v. Bass,[1] viz., it did not establish that Petitioner had received the gun after it left New York. The testimonial evidence only established Petitioner's possession of the gun when

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1. 404 U.S. 336, 92 S.Ct. 515, 30L.Ed.2d 488 (1971).

arrested, not when or where he first received the weapon. Taking all of it into account, the evidence did not logically exclude beyond a reasonable doubt the possibility that Petitioner might have received the gun in New York before its interstate travel in May, 1971, then carried it himself to Texas, where he was arrested with it five months later, in October, 1971. Without proof that he received the gun after its prior travel in commerce, Petitioner contended, there could be no conviction under §1202(a). There were two ways, in the context of the case, by which the Goverment could meet its burden of demonstrating prior travel of the gun: By proving either (1) that Petitioner first received the gun after May 27, 1971, or (2) that Petitioner first received the gun in the State of Texas (which, given the rigidly-fixed temporal-geographical matrix supplied by the stipulation, would compellingly suggest the gun's movement out of New York). Of these two ways, only the question of place of receipt was submitted to the jury for consideration. Thus, the Government's ability to prove a consummation of the offense came finally to rest upon this issue along. How proof of it was to be made--by stipulation, directly, circumstantially, inferentially --was relatively unimportant; any method would do. However, <u>that</u> it be made was essential, for without such proof the court did not have jurisdiction of the

offense. And for this reason, use of the reasonable-doubt standard was mandatory.

The Government countered that Petitioner's stipulation of the gun's travel, along with proof at trial that Petitioner was later arrested in possession of the gun, was sufficient <u>per se</u> to establish an interstate-commerce nexus. Travel of the gun prior to receipt was not an essential element of the offense. The place of receipt needed to be shown, of course, but only to fix venue. Consequently, it contended, place of receipt required only a lesser preponderance-of-the-evidence burden, the classical standard in proving venue.

The trial court apparently discerned a degree of merit in both arguments. It agreed with Petitioner's position to the extent of instructing the jury that possession is not synonymous with receipt, and that the Government must prove, directly or circumstantially, where Petitioner had originally received the firearm.

However, the trial court accepted the Government's contention that place of receipt was only a venue issue, and required for its proof a preponderance burden.

The jury instruction provided, in

part:

> The fact that Vicente Ramirez possessed the firearms referred to in the indictment, if you so find, does not permit you to draw the inference that Vicente Ramirez received the firearms in question in the Western District of Texas. This must be proven by direct or circumstantial evidence.
>
> If, under the instruction just given to you on the essential elements of the offenses, you find that the United States proved beyond a reasonable doubt that the offenses were committed by Vincente[sic] Ramirez and you find that the United States has also established by a preponderance of the evidence that the firearms were received by Vincente [sic] Ramirez in the Western District of Texas then you are to convict the defendant.
>
> (emphasis added)

Petitioner was convicted. The Court of Appeals for the Fifth Circuit affirmed without opinion.

REASONS FOR GRANTING THE WRIT

1. THE DECISION CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO WHETHER PLACE OF RECEIPT IS JURISDICTIONAL UNDER 18 U.S.C.APP. §1202(a), THUS REQUIRING A REASONABLE-DOUBT BURDEN FOR ITS PROOF.

Section 1202(a) of Title 18, Appendix, prohibits, inter alia, the receipt of a firearm by a convicted felon if the receipt affects commerce.

The receipt affects commerce if "the firearm received has previously traveled in interstate commerce." United States v. Bass, supra.

In the instant case, the Fifth Circuit, entered without opinion, is in direct, decisional conflict with that of the Eighth Circuit in United States v. Mancino, 474 F.2d 1240 (8th Cir.1973), cert.den. 412 U.S. 953, 93 S.Ct. 3020, 37 L.Ed.2d 1007 (1973). In Mancino, the Eighth Circuit approved an instruction that posited both time and place of the firearm's receipt, in a §1202 (a) receipt case, as jurisdictional elements of the offense, thus requiring a reasonable-doubt standard of proof.

The relevant instruction approved in Mancino stated, 474 F.2d at 1241:

First: That the defendant at the time and place charged in each count of the indictment, received a firearm;

Second: That such receipt was in commerce or affecting commerce;

Third: That at the time of such receipt, defendant had been convicted of a felony by a court of the State of Minnesota.

(emphasis added)

2. THE DECISION BELOW EXEMPLIFIES A GROWING DISCORDANCE AMONG THE COURTS OF APPEALS OVER THE PROPER INTERPRETATION OF §1202(a).

At least one Circuit, the Eighth, has interpreted Dass to mean that, in §1202(a) receipt cases, the requisite nexus with interstate commerce is not, despite the language of Bass, established when it is shown that the firearm traveled in commerce prior to receipt, but rather when it is shown that the firearm was in commerce before the accused is charged with receipt of the weapon. United States v. Bumphus, 508 F.2d 1405, 1407 (5th Cir.1975); United States v. Haley, 500 F.2d 302, 304 (8th Cir. 1974).

Some of the cases arising under §1202(a) mention the importance of time of receipt as an element of the offense, e.g., United States v. Winer, 519 F.2d 256, 257 (8th Cir.1975). If time is an element of the offense, then so is place. Actually, the twin elements of time and place of receipt are, in almost all §1202(a) receipt cases, inseparably linked. That is, proof of where the accused received a firearm will most likely pinpoint, or at least closely bracket, the receipt within a fixed time frame. Similarly, proof of when the gun was received will do the same within a fixed interstate-commerce-travel frame. This is why the Government must prove the one or the other, either the time or the place of receipt, in order to show that the offense was committed. In the instant case, because Petitioner's stipulation was not dispositive of the interstate-commerce nexus question, the Government had difficulty in establishing either the time or the place of the firearm's receipt, and understandably urged that place of receipt should be submitted to the jury only as a venue issue, so as to enjoy a lesser burden of proof.

Petitioner believes that it is gross error to assume, automatically and reflexively, as the Fifth Circuit apparently did here, that place of receipt is

exclusively a function of venue. There are occasions when place of receipt serves--in addition to being a venue function--as a jurisdictional element. When place of receipt is genuinely a matter of venue qua venue in a given case, as it often is, then it should be established by a preponderance of the evidence. But if place of receipt is a fact issue whose resolution is necessary to constitute a crime, as it was in the instant case, then the Due Process Clause requires the stricter reasonable-doubt standard. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Proof of venue, under a preponderance burden, cannot be utilized to provide a missing jurisdictional element of the offense, as happened in the instant case when the trial court permitted the place of receipt to serve the dual function of proving both jurisdiction and venue. It is obvious that the jurisdictional character is the greater and the venue character is the lesser. It is the jurisdictional burden of proof, therefore, which must prevail.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the

judgment and opinion of the Fifth Circuit.

Respectfully submitted,

JACK PAUL LEON
1800 Milam Building
San Antonio, Texas 78205

COUNSEL FOR PETITIONER

December 23, 1975

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to The Solicitor General of the United States, Department of Justice, Washington, D.C, Counsel for the Respondent. I further certify that all parties required to be served have been served.

JACK PAUL LEON
1800 Milam Building
San Antonio, Texas 78205

COUNSEL FOR PETITIONER

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-1471
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VICENTE RAMIREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(October 28, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Supreme Court, U. S.
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No. 75-910

In the Supreme Court of the United States

OCTOBER TERM, 1975

VICENTE RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-910

VICENTE RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly instructed the jury on the burden of proof necessary to convict him of receiving a firearm that previously had traveled in interstate commerce, in violation of 18 U.S.C. App. 1202.

After a jury trial in the United States District Court for the Western District of Texas, petitioner, who had previously been convicted of a felony, was convicted on one count of receiving a firearm that had traveled in interstate commerce prior to its receipt, in violation of 18 U.S.C. App. 1202(a).[1]

The evidence showed that on October 24, 1971, petitioner was arrested in San Antonio, in the Western Dis-

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[1]Petitioner was acquitted on the second count, charging receipt of another firearm.

trict of Texas, for driving while intoxicated; he was carrying a loaded 38 caliber semi-automatic pistol (Tr. 222-224, 231-232). It was stipulated that the firearm had been shipped from Buffalo, New York to Fort Worth, Texas, in May 1971, and that about two months later it had been shipped to a dealer in San Antonio (Tr. 46-47). The evidence further showed that in September 1971, Eleazar Sanchez purchased the firearm from the dealer, and shortly thereafter traded it to a person known to him as "Toto" (Tr. 48-50, 87, 90). It was stipulated that petitioner had been convicted of a federal felony prior to the shipment of the firearms from New York (Tr. 47).

Petitioner contends that the court's venue instruction, which stated that in order to convict, the jury must find by a preponderance of the evidence that petitioner committed the offense in the Western District of Texas, permitted the jury also to find by only a preponderance of the evidence that petitioner received the firearm after its interstate movement.

18 U.S.C. App. 1202(a) makes it illegal for a convicted felon to receive "in commerce or affecting commerce * * * any firearm." The government meets its burden "if it demonstrates that the firearm received has previously traveled in interstate commerce." *United States* v. *Bass*, 404 U.S. 336, 350. In the instant case the court properly instructed the jury as follows (Tr. 356-357):

> [T]he United States must establish beyond a reasonable doubt, as to each count, each of the following propositions:
>
> * * * * * *
>
> 2. That on or about [September 15, 1971 and October 24, 1971] * * * [petitioner] knowingly received the firearm referred to in the relevant count of the indictment; and

> 3. That prior to the [above] dates * * * said firearm had previously been in commerce or affecting commerce, that is to say the firearm had previously traveled in interstate commerce.

The court then instructed the jury that if it found beyond a reasonable doubt that petitioner committed the offense, it could not convict unless it found by a preponderance of the evidence that he had committed the offense in the Western District of Texas, where venue had been laid (Tr. 357-358).[2]

Contrary to petitioner's contention, the venue instruction did not permit the jury to find by only a preponderance of the evidence that petitioner received the firearm after it had traveled interstate. Rather, the jury was instructed that it should consider venue only if it found beyond a reasonable doubt that petitioner committed the offense. The court carefully and correctly instructed the jury that it could find that petitioner committed the offense only if it found beyond a reasonable doubt, *inter alia*, that he received the firearm on or about a given date and that before that date the firearm had traveled in interstate commerce.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General,

FEBRUARY 1976.

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[2]Venue may be proven by a preponderance of the evidence. See, *e.g.*, *Simpson* v. *United States*, 229 Fed. 940 (C.A. 9).